In California, a prerequisite to retroactive application is assessing whether such application would "change the legal consequences of past conduct by imposing *new* or *different* liabilities based on such conduct[.]" *Californians for Disability Rights*, 39 Cal. 4th at 231 (emphasis added), quoting *Tapia*, *supra*, 53 Cal. 3d at 291. If there are no changed legal consequences, the statute can be applied fairly. However, if there are changed legal consequences, retroactive application "*is forbidden, absent an express legislative intent to permit such retroactive application.*" *Id.* at 231, quoting *Elsner*, *supra*, 34 Cal. 4th at 936-937 (emphasis added).[108]

Section 13304 cannot be retroactively applied because there would be changed legal consequences for pre-1969 conduct and the Legislature did not unambiguously intend (either explicitly or implicitly) the section is to have retroactive application.[109] For instance, the cleanup and abatement provision of Porter-Cologne was a much ballyhooed new addition to water quality control law.[110] Prior to its enactment, the Regional Board did not have authority to issue cleanup and abatement orders.

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the California Supreme Court cited the constitutional implications of imposing huge monetary damages on a party for conduct that occurred when the party was immune from liability under a prior statutory regime. 28 Cal. 4th 828, citing *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998) (plurality opinion invalidating a law retroactively imposing substantial financial obligations based on due process and takings concerns and interests of government in protecting expectations and stability in law) and *Landgraf*, 511 U.S. 244.

[108] The core principle behind this doctrine is the basic right of parties to "have liability-creating conduct evaluated under the liability rules in effect at the time the conduct occurred." *Californians for Disability Rights*, 39 Cal. 4th at 233, citing *Elsner*, *Tapia*, and *Aetna*, *supra*). Because retroactive application of a statute abrogates this important right, it is critical that the statutory language speaks with exceptional clarity.

[109] There are numerous examples where the courts have found a "changed legal consequence," prompting the court to reject retroactive application of the statute in question. *See, e.g.*, *Elsner*, *supra*, 34 Cal. 4th at 937-938 (changed legal consequences in expanded contractors' tort liability for past conduct); *Myers*, *supra*, 28 Cal. 4th at 840 (changed legal consequences in broader tort liability imposed on formerly immune tobacco sellers); *Tapia*, *supra*, 53 Cal. 3d 282, 297-299 (changed legal consequences in increased punishment for past criminal conduct); *Aetna*, *supra*, 30 Cal. 2d at 393 (changed legal consequences where statute allowed increased damage awards to be imposed by administrative agency).

[110] *See* Final Report of the Study Panel to the California State Resources Control Board, Study Project—Water Quality Control Program, p. 22 and App. A, pp. 67-68. (March, 1969) ("1969 Report") Ex. 20345; Ronald B. Robie, *Water Pollution: An Affirmative Response by the California Legislature*, 1 Pac. L. J. 1, 22-23 (1970). Ex. 20335.

Moreover, as explained further below, the regional board could not bring an enforcement action against past discharges let alone order water replacement. No provision existed before Porter-Cologne that empowered the regional boards to cleanup pollution, recover costs or order water replacement.

Turning to legislative intent, enacted originally in 1969, Section 13304 was entirely silent on the question of retroactivity.[111] Ann. Cal. Water Code § 13304 (West. 2007). At the time of its initial consideration, the Legislature did not address the question of retroactivity. Thus, neither the text nor legislative intent even hint that the statute was meant to apply retroactively, much less unambiguously indicating so. Thus, the statute necessarily fails to meet the high bar set by the courts for retroactive application. Construction of the statute as retroactive would run afoul of the U.S. Constitution's Fifth Amendment's Takings and Due Process Clauses because of the substantial costs to be imposed on Goodrich, and would ignore the established canon of statutory construction that requires avoiding "constitutional infirmities." *U.S. Const.* amend. V; *Myers*, 28 Cal. 4th at 846-847. Although Section 13304 cannot be given retroactive effect as a matter of law, the Regional Board now seeks to enforce it against Goodrich for operations that occurred prior to its enactment thereby changing the legal consequences of its conduct after the fact.

b. Subsequent Amendments to Cal. Water Code Section 13304 Have Not Made it Retroactive, But Rather Confirm that It Was Not Intended to Apply to Acts Before Its Passage

The express language of Section 13304(j), as well as its legislative history, makes clear that the amendments made to Section 13304 in 1980 has no retroactive effect. In 1980, through A.B. 2700, the Legislature amended Section 13304(a) as follows:

[111] In contrast, when it desires, the Legislature knows how to specify retroactive application. *See, e.g.*, Civil Code § 1646.5 ("This section applies to contracts, agreements, and undertakings entered into before, on, or after its effective date; it shall be fully retroactive"); Govt. Code § 9355.8 ("This section shall have retroactive application..."); Probate Code § 2640.1(d) ("It is the intent of the Legislature for this section to have retroactive effect").

> Any person who *has discharged or discharges* ~~discharges~~ waste into the waters of this state in violation of any waste discharge requirement or other order *or prohibition* issued by a regional board or the state board, or who *has caused or permitted, causes or permits, or threatens to cause or permit* ~~intentionally or negligently causes or permits~~ any waste to be discharged or deposited where it is, or probably will be, discharged into the waters of the state and creates, or threatens to create, a condition of pollution or nuisance, shall upon order of the regional board clean up such waste or abate the effects thereof or, in the case of threatened pollution or nuisance, take other necessary remedial action. Upon failure of any person to comply with such cleanup or abatement order, the Attorney General, at the request of the board, shall petition the superior court for that county for the issuance of an injunction requiring such person to comply therewith. In any such suit, the court shall have jurisdiction to grant a prohibitory or mandatory injunction, either preliminary or permanent, as the facts may warrant.

Ex. 20330. This amendment, which added the past tense and omitted language concerning intentional or negligent behavior, *did not, as a matter of law, make the section retroactive*. As explained above, the mere use of the past tense does not overcome the presumption against retroactive application. *See, e.g., Myers*, 28 Cal. 4th at 842-843 (rejecting retroactive application of Civ. Code § 1714.45 as to parties who "have suffered or incurred injuries" and to claims which "were" brought). Moreover, the legislative history and lack of clarity in Section 13304(j) make it clear that the statute was not intended to and cannot have retroactive effect as a matter of law.

The legislative history[112] of A.B. 2700 demonstrates that the effect of the amendment adding the past tense was simply to allow the Regional Boards to issue cleanup and abatement orders concerning discharges which had ceased prior to discovery, but had occurred after enactment of the statute's amendment. Ex. 20343. The intent was *not* to reach activities that occurred years, or even decades, before its enactment. In fact this very concern was raised at the time of the bill's consideration. On June 4, 1980, at the time A.B. 2700 was under consideration, the California Manufacturers Association ("CMA") expressed such a concern. Robert Monogan of

[112] Goodrich respectfully requests that the Hearing Officer take judicial/official notice of the legislative history of the Porter-Cologne Act and specifically of A.B. 2700, Stats. 1980, c. 808, p. 2538, § 3. Evid. Code, §§ 452(c), 459.

CMA wrote to Assemblyman McCarthy, with a copy to the State Board and then-Chief Counsel of the State Board, William Attwater, stating:

> We are...opposed to the addition of the words "has discharged" and "has caused or permitted". . . What these words do is impose retroactive liability on dischargers covering events in past years which presumably have already been dealt with.[113]

Ex. 20327. On that same day, Assemblyman McCarthy, the author of the bill, requested that the Senate Committee on Health and Welfare postpone consideration of the bill. Ex. 20328. Chief Counsel Attwater responded by letter one week later, on June 11, 1980, addressing CMA's retroactivity concern:

> Liability for past discharges has been limited by Amendment 6[114] which provides that Section 13304 does not impose any new liability for acts occurring before the effective date of the Porter-Cologne Water Quality Act.[115]

Ex. 20329. One week later, on June 18, 1980, the Senate Health and Welfare Committee added new subdivision (f) to section 13304, which read:

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[113] This exchange is further evidence that the 1969 enactment itself was not retroactive, as was the California Manufacturers Association's support of the provision in 1969.

[114] "Amendment 6" as proposed by the Chief Counsel, provided:

"This section does not impose any new liability for acts occurring before the effective date of this division."

[115] This letter clearly explains that the use of the past tense in subdivision (a) was not to impose retroactive liability but only to address situations after the enactment of the amendment, where the Regional Board could not be present at the site simultaneously with the actual discharge as Chief Counsel Attwater explained by example: "During the dry summer months, the owner of an inoperative mine does not "discharge or deposit" mine waste in a manner which creates or threatens to create a condition of pollution or nuisance in an adjacent stream. However, when the rainy season arrives, acid wastes at the mine will combine with runoff and in fact reach the stream and cause pollution. Under existing law, the Regional Boards could not issue an order directing the mine owner to take necessary remedial action to prevent this from occurring. This is false economy since avoidance of pollution is less worthy to both the discharger and the environment than the cleanup of a problem after the fact. . . With regard to the need for clarifying Regional Board cleanup and abatement authority over past discharges, as discussed above, Section 113304 is written in the present tense. Since it is impossible for our Boards to know of every discharge as it is taking place, we want to make it crystal clear that a person who has discharged, either in violation of waste discharge requirements or so as to create a condition of pollution or nuisance, can be held responsible."

> This section does not impose any new liability for acts occurring before January 1, 1981, if the acts were not in violation of existing laws or regulations at the time they occurred.[116]

Ex. 20330. The bill was ultimately enacted with this language and the subdivision has not been amended since, other than being redesignated as subdivision "j." This subdivision expressly precludes retroactive application.

Any argument that subdivision (j) somehow permits retroactive application is contrary to its express terms and is clearly an insufficient expression of intent given its ambiguity. For instance, the universe of laws or regulations that can be alleged to have been violated for an entity to be brought within the scope of Section 13304 is entirely undefined. Would a speeding ticket suffice? If not, what are the logical confines of this clause? Moreover, what exactly does "new liability" mean in this context? Rather than encouraging a frolic and detour down the historical lane of possible legal violations, the clause is best read (again, o*nly if* one demands that the provision actually creates new liability) to preserve the right of the agency personnel (who were endorsing the changes in the law) to continue to prosecute the cases on their desks under the laws that existed when A.B. 2700 was passed.

Accordingly, subdivision (j) expressly precludes retroactive application of Section 13304. Any attempt to read retroactivity into the language of subdivision (j) must fail given it is not the unambiguous pronouncement of the Legislature's intent that necessary to impose retroactive liability, and such application is clearly contrary to the legislative history.

c. Even if the State Board Erroneously Interprets Section 13304(j) as providing Retroactive Effect, the Advocacy Team Bears the Burden of Proving that Acts Occurring Before 1981 Were Contrary to Laws or Regulations *"At the Time They Occurred."*

Even if the State Board was to erroneously render Section 13304(j) as permitting retroactivity, the Advocacy Team has not proven (and nor are there contemporary

[116] Similar clauses appear in Health and Safety Code Sections 25187.6(e) and 25366(a), but that statutory language has also not yet been interpreted by courts.

enforcement proceedings to suggest) that Goodrich's acts were contrary to law at the time they occurred.[117] The Advocacy Team bears the burden of proving by a preponderance of the evidence that Goodrich violated laws or regulations[118] applicable *during its tenure at the site*. The Advocacy Team must do more than simply point to, without further explanation or even pinpoint citation, recent State Board decisions, as it has done in its Points and Authorities. The Advocacy Team has not proven this and cannot do so, as there is no evidence to suggest that Goodrich's acts violated any such laws or regulations at the time they occurred.

To start with, past State Board decisions with respect to the interpretation of subdivision (j) inadequately address its application and are simply wrong in certain respects. In particular, the Advocacy Team cites to *County of San Diego*, WQ 96-2 (1996); *Lindsay Oliver Growers*, WQ 93-17 (1993), and *Aluminum Co. of America*, WQ 93-9 (1993), for the proposition "that discharges that were in violation of the Dickey Act, continue to be a violation of California law." *Tellingly, the Advocacy Team does not cite any provision or the elements of the Dickey Act.*[119] Moreover, the Advocacy Team has provided no evidence, much less evidence that meets their` burden of proof, to prove that Goodrich's acts between 1957 and 1964, the time of its alleged actions, were indeed in violation of the Dickey Act at the time they occurred.

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[117] A basic yet important part of due process in this state is for an accused party to be notified of the laws it has been accused of violating. Thus, Goodrich reserves the right to respond to such charges outside of the mandated page limit the Hearing Office has provided in the rebuttal phase of this proceeding.

[118] It is a rare legal exercise that requires the trying of a case concerning actions that occurred more than forty years ago with law that existed at the time. This is further evidence against a retroactive interpretation of Section 13304(j).

[119] Implicit in the Advocacy Team's argument on this topic is that the reforms ushered in by the Porter-Cologne Act with much pomp and circumstance were illusory, and the statutes of the day would have applied to Goodrich's alleged discharge in the identical fashion as contemporary law. Obviously, this was not the case. The Advocacy Team would benefit from review of the controlling laws at the time and secondary sources. Resources might include *Water Pollution: An Affirmative Response by the California Legislature,* 1 Pac. L. J. 1, 22-23 (1970); *State Control of Water Pollution,* 1 U.C. Davis L. Rev. 1 (1969); *Quality Control and Re-use of Water in California*, 45 Cal. L. Rev. 586 (1957); and *California's Water Pollution Problem*, 3 Stan. L. Rev. 649 (1950-51). Ex. 20335.

(1) Goodrich is Not Liable For Continuous or Passive Migration

The Advocacy Team is wrong in its claim that Goodrich is liable under Section 13304 "since the discharged material continues to migrate in the soil and groundwater toward further wells, the discharge constitutes a continuing violation subject to the Porter Cologne Act." Ad. Team P&As. Instead, the Advocacy Team must demonstrate, and it has not, that Goodrich's "acts," such as its alleged handling or disposal of perchlorate and TCE, were in violation of existing laws or regulations at the time they occurred between 1957 and 1964. As described below, it cannot do so.

The Advocacy Team's reliance on *Zeocon Corporation* contradicts the Dickey Act and is contrary to the existing language of Subsection (j), which at best might be argued to impose liability for "acts occurring before January 1, 1981, *if the acts were in violation of existing laws or regulations at the time they occurred.*" WQ 86-2 (emphasis added.) The Regional Board and State Board cannot so conveniently skirt the express provisions set forth by the Legislature in the Water Code by claiming that passive migration of contamination constitutes an "act" by Goodrich and reach back four decades later to impose liability that clearly did not exist at the time. Following the Advocacy Team's assertion that the mere migration of discharged material is actionable against a party, then virtually any discharge of waste prior to the enactment and amendments of Water Code Section 13304 would be actionable under Water Code Section 13304(a), completely eviscerating Water Code Section 13304(j) and at odds with the legislative history.

Rather, *Zeocon* at best is off point as it pertained to liability of an existing landowner for discharges that had occurred prior to its ownership of the property at issue. In fact, the authority relied upon by the State Board in *Zeocon* only lends further support that there is no authority, and never has been, to issue a cleanup and abatement order to the operator of a facility during the era of the Dickey Act, where a regulated discharge is discovered after the cessation of operations. Instead, as *Zeocon*

points out, the responsibility for continuing migration would be on the "persons who presently have legal control over the property from which the harmful materials arises." Notably, all of the property owners of the 160-acre area, including Ken Thompson, Inc. who owns the McLaughlin pit, are inexplicably absent from the proposed CAO. *See* Section XVI.

The alleged "acts" in question involve an alleged discharge or disposal of waste by Goodrich in violation of existing laws or regulations at the time they occurred (*i.e.*, 1957 to 1964), not the mere passive migration of contamination decades later from the alleged act of discharge or disposal. Both federal and state appellate courts have found passive migration to not be a "discharge." Sitting *en banc*, the Ninth Circuit held that passive migration was not a "discharge" or "deposit" under CERCLA. *Carson Harbor Village Ltd. v. Unocal Corp.*, 270 F.3d 863, 879-80 (9th Cir. 2001) (*en banc*), citing 42 U.S.C. § 6903(3) and 42 U.S.C. § 9607(a)(2). In interpreting the term "discharge" in the context of a Proposition 65 claim, Cal. Health & Safety Code Section 25249.5, *et seq.*, that passive migration constituted discharge, the California Court of Appeal in *Consumer Advocacy Group, Inc. v. Exxon Mobil Corp.* dismissed the claim stating that "discharge or release' as used in [Health and Safety Code Section 25249.5] refers to a movement of chemicals from a confined space into the land or the water. The subsequent passive migration of chemicals through the soil or water after having been so discharged or released by a party does not constitute another discharge or release within the meaning of section 25249.5." 104 Cal. App. 4th 438, 449 (2002).

(2) Goodrich Did Not Violate the Dickey Water Pollution Act

As the Advocacy Team points out, the Dickey Water Pollution Act (Stats. 1949, ch. 1549, p. 2782) was in force during the entire period in which Goodrich operated on the site. Neither the Advocacy Team's Points and Authorities, however, nor the cited State Board decisions, explain that the Dickey Act did not prohibit discharges outside of a waste discharge requirement and did not contain any authority for the Regional Board

to order cleanup or abatement or water replacement. Rather, the Dickey Act, under limited conditions, authorized the regional water pollution control boards to regulate existing discharges by prescribing waste discharge requirements, which it did not do with respect to Goodrich's operations. For "discharges" involving industrial waste not into community sewer systems, the Regional Board initially had to determine that a "discharge" existed and then *would have had to request that the discharger file a report of discharge*. Cal. Water Code § 13054 (Deerings 1961); Ex. 20398.[120] Thereafter, the Regional Board, after a hearing, would have had to prescribe waste discharge requirements. Only then, could the discharger be in violation of the law at the time if they failed to comply with the prescribed waste discharge requirements. With respect to the Goodrich operations, *the Regional Board never made the initial request and never issued waste discharge requirements to Goodrich*. Clearly, from 1957 to 1964, no one would have considered Goodrich's operations to be either regulated by or in violation of the Dickey Act.

(a) There is No Evidence of a Discharge to Waters at the Time of Goodrich's Operations

There is no evidence that the alleged activities conducted by Goodrich would have been understood to have caused a discharge or resulted in a "discharge" as defined by the Dickey Act at the time. Under the Dickey Act, discharges were required to be constant and directly enter a water of the State:

> The tests which control whether a discharge of waste under the jurisdiction of a regional water pollution control board is occurring are these. First, there must be a *present discharge*, that is, a *present flowing or issuing out*, of harmful material from the site of a particular operation into the waters of the State. 27 Ops. Cal. Atty. Gen. 183 (1956); Cal. Water Code § 13054.3 (Deerings 1961.); Ex. 20399.[121]

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[120] The pertinent part of Section 13054 stated: "Upon request of the regional board, any person presently discharging sewage or industrial waste within any region, other than into a community sewer system, shall file with the regional board of that region a report of such discharge." (Deerings 1961). *See* Discussion regarding "Dixie's Plume," *supra*.

[121] This view of existing law is buttressed by State Board Chief Counsel Attwater's view of the law at the time as recorded in his letter to the California Manufacturer's

In contrast, Goodrich's actions did not constitute discharges because any of Goodrich's alleged discharges were not a "present flowing or issuing out" into the waters of the State.[122] Under the Dickey Act, the Regional Board did not have authority to issue waste discharge requirements to past operators, even where their former operations were later discovered to be the cause of a discharge. Instead, where there was a "current drainage, flow or seepage from inactive, abandoned or completed operations into waters of the State" resulting in a pollution or nuisance, waste discharge requirements proscribed by the Regional Board were to be "imposed upon the persons who presently have legal control over the property from which the harmful material arises." 26 Ops. Cal. Atty. Gen. 88, 90 (1956); *County of San Diego*, WQ 96-2; *Aluminum Co. of America*, WQ 93-9; *see* § 13305(f).[123]

Given the depth to groundwater being over 400 feet, as further addressed above in Section III, there is no evidence to support that even if waste containing perchlorate or TCE was deposited on the ground, that it ever would have reached groundwater during the time that Goodrich operated. In fact, the evidence shows that any discharge of

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Association. Ex. 20329 (stating "[u]nder existing law, the Regional Boards could not issue an order directing the mine owner to take necessary remedial action to prevent this from occurring.").

[122] This deficiency of the Dickey Act was known and considered in the months before adoption of the Porter-Cologne Act. A task force created at the behest of Assemblyman Porter echoed this interpretation in a study document that is acknowledged as the official legislative history of the Porter-Cologne Act. Final Report of the Study Panel to the California State Resources Control Board, Study Project—Water Quality Control Program, p. 55 (March, 1969) ("1969 Report") Ex. 20331, 20345. These recommended changes were endorsed by the State Board on March 20, 1969 before transmittal to the Legislature.

[123] This reasoning is also relied upon by the Advocacy Team in citations to SWRCB Orders 96-2 and 93-9. Ad. Team P&As, 30. The Legislature has established a clear liability policy regarding "nonoperating industrial or business location[s]" under Section 13305(f), which provides: "The owner of the property on which the condition exists, or is created, is liable for all reasonable costs incurred by the regional board or any city, county, or public agency in abating the condition." At the very least, these authorities further indicate, in addition to the factual adduced above concerning the current owner's obvious connection with the property and responsibility for the McLaughlin Pit, that the Advocacy Team and State Board *should be pursuing the persons who have legal control over the 160-acre property*. In fact, it is negligent and an abuse of discretion for the Water Boards to *not prosecute* the current owner.

waste by Goodrich still would not have reached the groundwater under the conditions of the site and its operations. Oxley Dec. ¶¶ 13, 14; Kresic Dec. ¶ 18, 54; Kavanaugh Dec. ¶ 35.

Moreover, there is no evidence that the Regional Board ever required, or ever would have required, the issuance of any waste discharge requirements for Goodrich's operations at the time. The evidence shows that Goodrich carefully burned its waste in compliance with the military standards of the day and that there was no reason to believe that waste would be discharged to the waters of the State. Oxley Dec. ¶¶ 13, 14; Merrill Dec. ¶¶ 15, 16, 19, 29; Kresic Dec. ¶¶ 18, 24-25, 52, 54. Instead, the evidence is to the contrary, that Goodrich's operations were intended to eliminate its waste material given safety concerns over potential explosions and fires and that the burning of the waste would never have been thought of at the time as leaving any residual mass of perchlorate capable of being discharged to groundwater at the 160-acre parcel, let alone at the time of Goodrich's operations. Merrill Dec. ¶¶ 15; Oxley Dec. ¶¶ 13, 14.

(b) There is No Evidence that a Discharge from Goodrich's Operations caused Pollution or a Nuisance at the time.

Even if a "discharge" to waters of the State did exist at the time of Goodrich's operations, it would have also had to had caused "pollution" or a "nuisance" as defined in the Dickey Act *at the time*, which it did not:

> [T]he discharge of the sewage or industrial waste must, of course, cause a "pollution" or a "nuisance" as defined in the Act (Water code sec. 13005). That is, it must result in either (1) impairment of the quality of the waters of the State to a degree which adversely and *unreasonably* affects such waters for beneficial uses, *i.e.*, pollution; or (2) damage to any community by odors or unsightliness by virtue of the discharge being *unreasonable*, *i.e.*, nuisance. [¶] Whether harmful material is *currently* draining or seeping or flowing into the waters of the State and whether there is a resultant pollution or nuisance must be ascertained under the facts of each case.... (emphasis in original) 27 Ops. Cal. Atty. Gen. 184 (1956).[124] *See also* Cal. Water Code § 13005 (Deerings 1961), Ex. 20398.

[124] In a 1970 law review article, an original State Board member stated that "The present definition of nuisance is considered to be practically unenforceable because of its requirements of proof of the vague terms "damages" and "unreasonable practices..."

In the case at hand, the Advocacy Team has not, and cannot, demonstrate that a discharge of perchlorate during the late 1950's and early 1960's would have been considered either pollution or a nuisance. In fact, in its Points and Authorities, the Advocacy Team asserts that decades later in 1987 "perchlorate was not known at the time to regulatory agencies, or others, as a threat to the beneficial uses of the groundwater." Ad. Team P&As, p. 90. Likewise, the Advocacy Team claims that in 1987 "perchlorate was not considered to be a groundwater contaminant of concern in the Santa Ana Region, or anywhere else. . . . There were no drinking water standards or drinking water advisory levels for perchlorate. Perchlorate was not known to exist in groundwater, since an analytical method capable of detecting perchlorate in groundwater was not developed until 1997." *Id.* As such, the Advocacy Staff cannot also claim that a discharge of perchlorate would have been recognized as being the cause of pollution or a nuisance at the time of Goodrich's operations decades earlier.

Further, the Advocacy Team has put forth no evidence as to what level of perchlorate contamination existed in the groundwater or would have constituted "pollution" or a "nuisance" during the time of Goodrich's operations. Even today, the evidence demonstrates that the levels of perchlorate detected in the groundwater in the Rialto-Colton Basin would not cause an adverse health effect. Borak Dec. ¶ 37-42. No one has come forward attesting to the fact that either a condition of pollution or a nuisance existed at the time of Goodrich's operations.

(3) Advocacy Team has Not Proven that Goodrich Negligently or Intentionally Discharged Waste

Even if the State Board erroneously seeks to apply Water Code Section 13304 to Goodrich's operations, the Advocacy Team would need to demonstrate that Goodrich would be liable under the initial version of the Water Code Section 13304(a), which was limited to intentional or negligent discharges. The State Board has previously

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Ronald B. Robie, *Water Pollution: An Affirmative Response by the California Legislature*, 1 Pac. L. J. 1, 8 (1970). Ex. 20335.

acknowledged that strict liability is limited to only acts occurring after January 1, 1981. *County of San Diego, City of National City, and City of National City Community Development Commission*, WQ 96-2 (1996); *Lindsay Olive Growers*, WQ 93-17 (1993). Prior to 1981, Water Code Section 13304(a) only applied to persons "who *intentionally or negligently* causes or permits any wastes to be deposited where it is discharged into the waters of the state and creates a condition of pollution or nuisance." (emphasis added). The Advocacy Team has demonstrated neither.

The evidence is that Goodrich was fastidious in the running of its operations. *See* Section III, *supra*; Merrill Dec. ¶¶ 12-14. Goodrich diligently abided by the safety procedures prescribed at the time by the United States military, which required Goodrich to burn its waste. *See* Section III, *supra*; Merrill Dec. ¶¶ 12-15. One cannot find that thirty years later, Goodrich intentionally or negligently discharged into the groundwater.

In the context of Section 13304, a finding of negligence would need to include, among other things, proof that Goodrich did not comply with the applicable standard of care of the day.[125] The Advocacy Team has not adduced any evidence demonstrating that Goodrich violated any relevant standard of care at the time of its operations or any other element necessary to prove negligence. The standard of care analysis is an objective standard. "When the standard of care is not fixed by statute, ordinance, regulation, safety order or company rule, the settled standard for determining what ordinary care would have required in particular circumstances is the hypothetical conduct of a person assumed to be reasonably prudent." Cal. Jur. 3d Negligence § 25. Translated to the business context, the standard of care is that of a professional, skilled

[125] *See, e.g., Raymond v. Paradise Unified School Dist.*, 218 Cal. App. 2d 1, 6 (1963), citing *McEvoy v. American Pool Corp.*, 32 Cal. 2d 295, 298 (1948) and *Routh v. Quinn*, 20 Cal. 2d 488, 491-492 (1942) (negligence requires the existence of a duty to use care as to the person bringing the negligence action; proof of a breach of such duty by the creation of an unreasonable risk of harm; proximate cause; and actual harm. "In California, harm or injury to the plaintiff is an essential element of a ripe cause of action in negligence or strict liability." *Buttram v. Owens-Corning Fiberglas Corp.*, 16 Cal. 4th 520, 531, fn. 4 (1997), citing *Sinai Temple v. Kaplan* 54 Cal. App. 3d 1103, 1113 (1976). As stated above, the only evidence generally addressing harm proves that there was no such harm. Borak Dec. ¶ 37-42.

company. *See, e.g., Sea-Land Service, Inc. v. Matson Terminal* Co., 253 Cal. App. 2d 885, 889 (1967). "Although custom does not fix the standard of care, evidence of custom is ordinarily admissible for its bearing on the issue of whether particular conduct was negligent. Such evidence is received . . . to aid the trier of fact in determining whether the particular conduct of a party did or did not measure up to the care required in the particular case." Cal. Jur. 3d Negligence § 31, citing *Gyerman v. United States Lines Co.*, 7 Cal. 3d 488 (1972).

The Advocacy Team does not deny that the alleged actions of Goodrich were in line with the standard of the day. Goodrich diligently abided by the safety procedures prescribed at the time by the United States military, which required Goodrich to burn its waste.[126] *See* Section III, *infra;* Merrill Dec. ¶ 13-15. For the same reasons, there is no evidence that Goodrich intentionally discharged any waste to waters of the state. Rather, as discussed above in Section III, the military procedures, which Goodrich abided by, were calculated to eliminate the waste. In addition, no one had the requisite knowledge at the time to form the necessary intent that Goodrich's operations would cause a discharge to the groundwater over 400 feet below the ground surface. *See* Section III, *supra.* Forty years later, one simply cannot find that Goodrich intentionally or negligently discharged into the groundwater.

(4) There is No Evidence that Goodrich Violated Any Other Laws at the Time

The Advocacy Team does not alleges that Goodrich violated any other laws at the time of its operations. The State Board decisions concerning pre-1981 liability under Water Code Section 13304 relied upon by the Advocacy Team reference certain other laws that it holds can potential form the basis of liability, including the Health and Safety Code Sections 5410-5462, Fish and Game Code Section 5650, and nuisance. *County*

[126] *See, also,* Cal. Civ. Code Section 1714.6, *infra.*

of San Diego, WQ 96-2 (1996); *Lindsay Oliver Growers*, WQ 93-17 (1993); *Aluminum Co. of America*, WQ 93-9 (1993). The Advocacy Staff has failed to demonstrate that Goodrich is liable under any of these laws, nor can it.

(a) Goodrich did not violate Health and Safety Code Sections 5410-5462

When enacted in 1949, the Dickey Act and related provisions in the Health and Safety Code defined the terms "contamination" and "pollution" to delineate the mutually exclusive regulatory responsibilities of the State Water Pollution Control Board and the State Department of Public Health. 26 Ops. Cal. Atty. Gen. 254. The Regional Boards had no authority to address contamination. *Id.; Quality Control and Re-use of Water in California*, 45 Cal. L. Rev. 586, 587-88. Instead, the State Department of Public Health and local health officers enforced provisions related to public health under the Health and Safety Code. *See* Cal. Health & Safety Code § 5410-5462 (Deerings 1961).

"Contamination" was defined as an "impairment of the quality of the waters of the State by sewage or industrial waste to a degree which creates an *actual hazard* to the public health through poisoning or through the spread of disease." § 13005 (Deerings 1961); Cal. Health & Safety Code § 5410 (Deerings 1961). (emphasis added.) The Advocacy Team has not demonstrated that *any* impairment of the quality of the groundwater occurred during Goodrich's operations or from Goodrich's alleged discharge, let alone that Goodrich created an actual hazard to public health. As the definition clearly states, contamination must create an *actual hazard* to the public health *through poisoning or spread of disease.* The Advocacy Staff has presented no evidence to demonstrate that "contamination" existed at the time of Goodrich's operations, or as explained below, that any alleged discharge caused by Goodrich was of such a degree that it created an actual hazard to public health. *See* Section III, *infra.* On the other hand, the only evidence advanced in this proceeding weighs against a finding of actual harm to any person's health, either forty years ago or today. *See* Section III, *infra.;* Borak Dec. ¶ 37-42.

Further, there can be no contamination if the public is effectively excluded from any contaminant. 26 Ops. Cal. Atty. Gen. 256, Ex. 20399.[127] The Advocacy Team has not adduced evidence to suggest that Goodrich created any such hazard that manifested at the time of its operations on the property. In addition, there is no evidence that an investigation or enforcement order was ever issued against Goodrich at the time of its operations. The Advocacy Team has not proven that Goodrich violated the Health and Safety Code at the time of its operations.

(b) Goodrich did not Violate Fish and Game Code Section 5650

To no surprise, the Advocacy has not attempted to demonstrate that Goodrich violated the Fish and Game Code, nor can it. In fact, the Fish and Game Code clearly could not even have applied to the allegations at hand.

Enacted roughly at the time when Goodrich began operating on the property, Section 5650 remained unchanged for almost forty years. Over the duration that Goodrich inhabited the property, Section 5650 provided:

> It is unlawful to deposit in, permit to pass into, or place where it can pass into the *waters of this State* any of the following:
>
> (a) Any petroleum, acid, coal or oil tar, lampblack, aniline, asphalt, bitumen, or residuary product of petroleum, or carbonaceous material or substance.
>
> (b) Any refuse, liquid or solid, from any refinery, gas house, tannery, distillery, chemical works, mill or factory of any kind.
>
> (c) Any sawdust, shavings, slabs, or edgings.
>
> (d) Any factory refuse, lime, or slag.
>
> (e) Any cocculus indicus.
>
> (f) Any substance or materials deleterious to fish, plant life, or bird life.

Stats. 1957, c. 456, p. 1394 § 5650 (emphasis added).

The Advocacy Team has not proven that Goodrich "deposited" or "permitted to

[127] This Opinion of the Attorney General cited a 1949 Assembly Interim Fact-Finding Committee on Water Pollution for further support of this proposition.

pass" any of the substances in subdivisions (a) through (f) into "waters of this State." Equally important, under the Fish and Game Code, "waters of this State" does not include groundwater.

Section 5650 was enacted to protect fish and any interpretation must remain true to that purpose. The Attorney General, in a 1966 opinion, interpreted Section 5650 in the context of pesticide deposition to artificially constructed irrigation canals. The opinion concluded that "in constructed channels *where fish would not occur naturally, there would be no violation of section 5650 if fish have been excluded* from the sections where the deleterious material or substances retain their harmful effects." 48 Ops. Atty. Gen. 23, 24, 30 (1966) (emphasis added). To comport with the purpose of the statute, to protect fish life, "waters of this state" *must be defined as waters that contain fish.* Because the Attorney General did not conceive of the statute as protecting groundwater, it would not have been enforced against Goodrich.[128] It follows that because the groundwater at issue in this matter have no "fish therein," such waters are not "waters of this state" for purposes of the Fish and Game Code and would have been considered by the State to be "waters of this state" at the time of Goodrich's operations. Thus, Goodrich could not have violated Section 5650 during its operations on the property.

(5) Goodrich Did Not Commit A Public Nuisance

As explained above, given the Advocacy Team's own allegations as to the state of knowledge with respect to perchlorate in not only the 1950's and 1960's but decades later, they cannot legitimately claim that Goodrich would have been found to have

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[128] *See, also, People v. Miles*, 143 Cal. 636, 641-42 (1904) (Addressing Penal Code § 636, a companion statute to Penal Code Section 635, which was the predecessor of Section 5650, and holding: "The dominion of the state for the purpose of protecting its sovereign rights to the fish within its waters, and their preservation . . . extends to *all waters within the state, public or private, wherein these animals are habited or accustomed to resort for spawning or other purposes, and through which they have freedom of passage* to and from the public fishing-grounds of the state. *To the extent that the waters are the common passageway for fish . . . they are* deemed for such purposes public waters, and *subject to all laws of the state regulating the right of fishing.*") (emphasis added) (quoting *People v. Truckee Lumber Co.*, 116 Cal. 397 (1897)).

caused a public nuisance during the time of its operations in Rialto. Moreover, to prove a public nuisance claim, the Advocacy Team has to (1) identify a public right (2) where Goodrich's actions were unprivileged and substantially interfered with that right and that (3) Goodrich's conduct was negligent. *Lussier v. San Lorenzo Water District*, 206 Cal. App. 3d 92, 104-106 (1988). The Advocacy Team cannot meet this legal standard.

Civil Code section 3479 codifies the acts constituting nuisance as

> "[a]nything which is injurious to health [...] or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway[.]"

A public nuisance differs from a private nuisance in that it affects "at the same time an entire community or neighborhood, or any considerable number of person..." Civ. Code § 3480. There is no record and the Advocacy Team has provided no evidence to demonstrate that Goodrich did anything injurious to health or caused an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property at the time of its operations, let alone an entire community. If fact, as demonstrated in aerial photographs, Goodrich's operations back in the 1950's and early 1960's, were separated and far from the public. Plus, the evidence suggests that the existing perchlorate concentrations are not "injurious to health." Borak Dec. ¶¶ 37-42.

Further, nuisance actions are designed to redress a substantial and unreasonable invasion of one's interest in the free use and enjoyment of property. *Lussier v. San Lorenzo Water District*, 206 Cal. App. 3d at 100. While the central focus is the alleged unreasonable invasion, liability depends on conduct that directly and unreasonably interferes with the interest or creates a condition that does so. *Ibid* (citing numerous treatises). Liability may result from an invasion that is intentional and unreasonable, unintentional but caused by negligent or reckless conduct, or result from an abnormally dangerous activity for which there is strict liability. *Ibid.* Liability will not arise when the invasion is intentional but reasonable, entirely accidental, or not within the categories

listed above. *Ibid.* Citing cases from the era when Goodrich operated on the site, the court concluded that the law in California required negligent conduct for the imposition of nuisance liability. *Ibid.* (citing *Spaulding v. Cameron*, 38 Cal. 2d 265, 266 (1952); *Granone v. County of Los Angeles*, 231 Cal. App. 2d 629, 649-651 (1965); citing also *Sturges v. Charles L. Harney, Inc.*, 165 Cal. App. 2d 306, 317-318 (1958); *Calder v. City etc. of San Francisco*, 50 Cal. App. 2d 837, 839-840 (1942)).[129]

Because Goodrich's operations did not interfere with any public (or even private) right, Goodrich could not have committed a nuisance. There is no evidence that there was any interference of anyone's right at the time of Goodrich's operations. At the time the alleged acts occurred in the late 1950's to the early 1960's, perchlorate was not recognized as a health issue. *See* discussion, *infra*. Moreover, as further addressed below, Goodrich's actions were not negligent. Its acts, if anything, were on a par with or exceeded the standards of the day, as required by its contracts with the military. *See* Section XV, *supra*.

3. Goodrich Is Not Liable Under Section 13304 Even If Existing Standards Apply

Even if Section 13304 is erroneously applied to Goodrich, the Advocacy Team has failed to meet its burden of proof with respect to Goodrich under the required elements of the statute. In particular, Section 13304(a) requires that the Advocacy Team prove that Goodrich (1) caused or permitted, causes or permits, or threatens to cause or permit any waste to be discharged or deposited; (2) where it is, or probably will be discharged into the waters of the state; *and* (3) creates or threatens to create, a

[129] *Lussier* distinguished early holdings where a rule of strict liability prevailed, stating that "[i]n course of time the law came to take into consideration not only the harm inflicted but also the type of conduct that caused it, in determining liability. This change came later in the law of private nuisance than in other fields. Private nuisance was remediable by an action on the case irrespective of the type of conduct involved. Thus the form of action did not call attention to the change from strict liability to liability based on conduct. *But the change has occurred*, and an actor is no longer liable for accidental interferences with the use and enjoyment of land but only for such interferences as are intentional and unreasonable or result from negligent, reckless or abnormally dangerous conduct." *Lussier*, 206 Cal. App. 3d at 101 (emphasis added).

condition of pollution or nuisance.

a. Goodrich Did Not Cause or Permit Waste to be Discharged or Deposited Into Waters of the State

The Advocacy Team has not proven the first two elements of Water Code Section 13304(a). It has not demonstrated that Goodrich "caused or permitted . . . or threatens to cause or permit any waste to be discharged or deposited where it is, or probably will be discharged into the waters of the state." Section 13304(a). While the charging papers (the Draft CAO) and the Advocacy Team's Points and Authorities allege that Goodrich used perchlorate and TCE, both documents conspicuously lack any actual evidence that any waste allegedly discharged or deposited by Goodrich either reached waters of the state, or that there is any probability of such. In fact, under oath in deposition the Advocacy Team readily admitted that they do not have any evidence to demonstrate that any discharge by Goodrich reached the groundwater or that it probably will. Saremi Dep., 656:19-24; Sturdivant Dep., 717:15-24; Holub Dep., 933:8-23, 934:10-20. 935:2-5, 93:10-15, 984:25-985:4, 985:18-21, 988:20-23. Rather, the Advocacy Team concedes that the only confirmed discharges to groundwater in the Rialto area are from the McLaughlin pit on the 160-acre parcel, which was constructed years after Goodrich operated on the property and from the Robertson Ready Mix water operations. Saremi Dep., 264:3-7, 391:12-17; Thibeault Dep., 378:19-379:5.

Nor has the Advocacy Team demonstrated that Goodrich is a person that threatens to cause or permit any waste to be discharged or deposited to the waters of the state. Goodrich's operations ended decades ago. It cannot be construed to be threatening to permit any waste to be discharged or deposited to the waters of the state.

b. There is No Proof that Any Discharge by Goodrich Has Caused or Threatens to Create "Nuisance" or "Pollution"

The Advocacy Team must further demonstrate that Goodrich "has caused . . . waste to be discharged or deposited where it is, or probably will be discharged or deposited into the waters of the state *and* creates, or threatens to create, a condition of

pollution or nuisance." Section 13304(c). (emphasis added). The Advocacy Team has not proven that any discharge by Goodrich that reached waters of the state created or threatens to create a condition of "nuisance" or "pollution." Any and each alleged discharge from Goodrich's operations must be of a sufficient magnitude to create or threaten to create a condition of "pollution" or "nuisance."

"Pollution" is defined in section 13350(l) as "an alteration of the quality of the waters of the state by waste to a degree which unreasonably affects . . . [t]he waters for beneficial uses." Section 13050(m) defines "nuisance" to mean anything which meets *all* of the following requirements: (1) is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property; (2) affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal; (3) occurs during, or as a result of, the treatment or disposal of wastes.

To support its allegations, the Advocacy Team attempts to string together a daisy chain of facts by citing to certain levels of shallow soil contamination and potentially down gradient groundwater data, but utterly fails to sustain its burden of proof that there was any amount of waste actually discharged to the groundwater by Goodrich that would constitute either pollution or a nuisance. It is clearly insufficient to allege that contamination as a whole can be found in the groundwater that would be considered as pollution or a nuisance. The Advocacy Team must demonstrate that *Goodrich* discharged waste in an amount that would constitute pollution or a nuisance. It has not done so.

Moreover, the Advocacy Team has not proven that any of the alleged Goodrich discharges were in amounts that caused "pollution" that altered the quality of the waters of the state to a degree which unreasonably affects its beneficial uses. Kresic Dec. ¶¶ 24-25, 52-53. An impairment of a water's beneficial uses must be determined by reference to an exceedance of an applicable water quality objective. Water Code

Section 13241. The Advocacy Team has not even specified which water quality objectives in the Santa Ana River Basin Plan have been exceeded, nor by how much the objectives have been exceeded.

Regarding nuisance, the Advocacy Team has not proven that Goodrich's alleged discharge caused, or threatens to cause, a condition that is injurious to health or any other elements of nuisance as defined by Section 13050(m). The Advocacy Team has not presented any evidence of the particular levels of perchlorate or TCE caused by any alleged discharge by Goodrich to the groundwater, nor has presented any evidence that that such particular levels are injurious to health, are is indecent or offensive to the senses, are obstructed the free use of property, so as to interfere with the comfortable enjoyment of life or property. *See, e.g.,* Borak Dec. ¶ 37-42.

The Advocacy Team has also not shown that any waste allegedly disposed of by Goodrich threatens to be discharged to the groundwater and it cannot. Section 13304(e) defines "threaten" in the context of cleanup and abatement orders as "a condition creating a substantial probability of harm, when the probability and potential extent of harm make it reasonably necessary to take immediate action to prevent, reduce, or mitigate damages to persons, property, or natural resources." The alleged areas of disposal are now capped under vast areas of concrete at the Rialto Concrete plant. Bennett Dec. ¶ 16. This barrier has formed an effective cap since the late 1980's. Kavanaugh Dec. ¶ 28. With this cap, there is no evidence that any contaminants can be mobilized and that no immediate action is necessary to prevent, reduce or mitigate damages to anyone. Kavanaugh Dec. ¶ 29, 91.

Accordingly, the Advocacy Team has not met its burden. It has proven that Goodrich discharged waste directly into waters of the state or in a manner where the discharge would have a probability of entering waters of the state. Critically, the Advocacy Team has not proven that Goodrich's discharge actually migrated to the groundwater in amounts that indeed caused pollution or nuisance or to a location and in an amount where there is a substantial probability of pollution or nuisance.

C. The State Board Has No Authority To Order Goodrich To Reimburse Water Purveyors For Past Or Ongoing Costs Or To Order Water Replacement

1. Water Code Section 13304(c)(1) only permits recovery of Government Agency Cleanup Costs Pursuant to a Civil Action

Water Code Section 13304(c)(1) only permits the recovery of cleanup costs by government agencies pursuant to a "*civil action*", not through the issuance of a cleanup and abatement order as sought by the Advocacy Team. The Advocacy Team is barred from seeking such costs in the subject proceedings.

In the Draft CAO, the Advocacy Team seeks to order Goodrich to "reimburse [the water purveyors] for past and ongoing reasonable costs incurred in cleaning up the waste, abating the effects of the waste, supervising cleanup or abatement activities, or taking other remedial action, in accordance with Section 13304(c)(1) of the California Water Code." Draft CAO, ¶13. It goes on to provide that the Executive Officer will be the arbiter of awarding the costs. *Id.* Remarkably, the Advocacy Team's points and authorities as to this issue are even more vague than the proposed CAO and lacks any support for the Draft CAO.

Regardless, the proposed order is clearly outside the authority of Water Code Section 13304(c)(1), which provides that "the amount of the costs is recoverable in a *civil action* by, and paid to, the government agency and the state board . . ." (emphasis added.) Accordingly, neither the Regional Board, its Executive Officer, nor the State Board are authorized to award such costs.

Not only does the Advocacy Team's assertion run contrary to the express language of Section 13304(c)(1), but the Advocacy Team has put forth no evidence of demonstrating that any costs were actually incurred by "government agencies" to cleanup or abate the effects of Goodrich's waste or that any such costs were "reasonable." There is absolutely no evidence submitted documenting either the amount of the "costs actually incurred," what was done, who incurred the costs, who was paid, that the costs were incurred by "government agencies," or how the costs were

"reasonable." Nor is there any support that these phantom costs pertained to cleaning up or abating the effects of *Goodrich's* alleged discharges.

Rather, in a clear instance of the "fox guarding the hen house," the Draft 2006 CAO astonishingly seeks to authorize the Executive Officer, the lead prosecutor in this matter, to be the arbitrator for awarding such costs in the future. Certainly, no court would ever provide the prosecutor or the plaintiff with the authority to determine the amount of such an award.

2. Section 13304 Impermissibly Affords Water Replacement

The State Board cannot issue water replacement orders pursuant to Water Code Section 13304. The water replacement provisions do not retroactively apply to Goodrich and are federally preempted.

a. The Water Replacement and Reimbursement Provisions Are Not Retroactive

The amendments from 2003 to Section 13304 regarding water replacement did not make the law retroactive. As explained above, Goodrich's actions occurred many years prior to the amendments and there is no clear legislative intent to make the provisions retroactive. Although the Legislature has had many opportunities to make Section 13304 retroactive, it has repeatedly not done so.

Further, subdivision (l), at best, can be interpreted to provide authority for water replacement back to the effective date of the Porter-Cologne in 1970, but certainly not prior to its existence:

> The Legislature declares that the amendments made to subdivision (a) of this section by Senate Bill 1004 of the 2003-04 Regular Session [regarding water replacement] do not constitute a change in, but are declaratory of, existing law.

Section 13304(l). Moreover, there is no support that Section 13304 actually did authorize the Regional Board to issue orders for water replacement prior to the 2003 amendments. The evidence and the law is actually to the contrary and cannot be so easily whitewashed.

The legislative intent is clear that Water Code Section 13304 did not previously authorize the Regional Board to issue cleanup and abatement orders requiring water replacement or reimbursement prior to the 2003 amendments. "'The evolution of a proposed statute after its original introduction in the Senate or Assembly can offer considerable enlightenment as to legislative intent . . . Generally the Legislature's rejection of a specific provision which appeared in the original version of an act supports the conclusion that the act should not be construed to include the omitted provision.'" *People v. Hunt*, 74 Cal. App. 4th 939, 947-948 (1999), citing *People v. Gooloe*, 37 Cal. App. 4th 485, 491 (1995) (citations omitted); *Central Delta Water Agency v. State Water Resources Control Bd.*, 17 Cal. App. 4th 621, 634-635 (1993) (citations omitted). "Accordingly, '[t]he sweep of [a] statute should not be enlarged by insertion of language which the Legislature has overtly left out.'" *Id.*, citing *People v. Brannon*, 32 Cal. App. 3d 971, 977 (1973); *Traverso v. People ex rel. Department of Transportation* 46 Cal. App. 4th 1197, 1207 (1996).

In the California Legislative session of 2000, Assembly Member Calderon introduced Assembly Bill 2646 ("AB 2646"), sponsored by the California Water Association, to make certain amendments to Water Code § 13304. Ex. 20339, 20340. The legislative history of AB 2646 makes it clear that, at that time, the Legislature specifically contemplated and decided against granting the Regional Board authority to mandate replacement water or reimbursement for water treatment. In particular, on August 7, 2000, AB 2646, was amended in the Senate proposing to modify Water Code § 13304(a) as depicted in the following underlined text:

> Any person who has discharged or discharges waste into the waters of this state . . . shall upon order of the regional board, clean up the waste or abate the effects of the waste, <u>including, but not limited to, the provision of replacement water or reimbursement for water treatment facilities for public water systems whose wells have been contaminated by the waste, rending the wells otherwise unavailable for use by the public water system . . .</u>

Ex. 20341. On August 30, 2000, the Senate specifically removed this proposed provision while the bill remained pending. Ex. 20342. Accordingly, the Legislature

consciously chose not to grant the Regional Board authority to require water replacement and/or reimbursement to water purveyors for water treatment.

Moreover, similar attempts by the Legislature to "declare what the law was", as with the 2003 amendments to Section 13304, have been met with doubt by the judiciary. For example, the California Supreme Court in *McClung v. Employment Development Dept.*, recently rejected such a statutory declaration as a legislative invasion of the judiciary:

> The legislative power rests with the Legislature. Subject to constitutional constraints, the Legislature may enact legislation. But the judicial branch interprets that legislation. Ultimately, the interpretation of a statute is an exercise of the judicial power the Constitution assigns to the courts. Accordingly, it is the duty of this court, when ... a question of law is properly presented, to state the true meaning of the statute finally and conclusively.... It is true that if the courts have not yet finally and conclusively interpreted a statute and are in the process of doing so, a declaration of a later Legislature as to what an earlier Legislature intended is entitled to consideration. But even then, a legislative declaration of an existing statute's meaning is but a factor for a court to consider and is neither binding nor conclusive in construing the statute. This is because the "Legislature has no authority to interpret a statute. That is a judicial task. The Legislature may define the meaning of statutory language by a present legislative enactment which, subject to constitutional restraints, it may deem retroactive. But it has no legislative authority simply to say what it did mean.

34 Cal. 4th 467, 472-73 (2004) (citations and quotation marks omitted).

What is undisputable is that the 2003 amendments and Section 13304(l) do not provide for retroactive application back to Goodrich's operations in the 1950's and 1960's, before which Section 13304 was first enacted. As the California judicial decisions were explicated above, any application of the water replacement provisions to Goodrich in this matter would clearly "change the legal consequences of past conduct by imposing *new* or *different* liabilities based on such conduct[.]" *Californians for Disability Rights*, 39 Cal. 4th at 230. At the time of Goodrich's conduct, the Water Code did not provide authority to the Regional Board, or any other right, for water replacement. With such a change in legal consequences, the Legislature would need to speak in certain terms for the statute to be retroactively applied.

b. The Water Replacement and Reimbursement Provisions Are Preempted by CERCLA and the City of Rialto Is Collaterally Estopped from Advancing Related Claims

The U.S. Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. § 101, *et seq.*, preempts the water replacement provisions of Section 13304. In addition, the City of Rialto is collaterally estopped from seeking relief under these provisions as a result of the U.S. District Court's Order finding that its state law claims were preempted and their subsequent dismissal. Order Granting In Part and Denying In Part Defendants' Motion to Strike, *City of Rialto, et al. v. U.S. Department of Defense, et al.*, Case No. ED CV 04-00079 VAP (SGLx) (filed April 15, 2004) ("*Rialto Dismissal*"). Ex. 20332.

(1) Water Code Section 13304's Water Replacement Provisions Conflict with the NCP and are Preempted by CERCLA

The 2003 amendments providing for water replacement are distinctly different and unlike other authority set forth in Section 13304. While the Regional Board's authority for the cleanup and abatement of waste pertain to cleaning up and abating the effects of discharges to the "waters of the state," the water replacement provisions inserted into Section 13304 oddly leap into new and different territory for the Regional Board by purporting to authorize it to order an alleged discharger to replace another party's well water. In essence, the 2003 amendments purport to make the Regional Board the arbiter of a dispute as between other parties, rather than being responsible for the safeguarding of the state's groundwater. This is the function of courts, which are well-situated to make such determinations, not the Regional Board. The task of proving up damages before a court, in matters similar to this one, proceeds under the full rigor of the Evidence Code and due process afforded.

The National Contingency Plan ("NCP"), 40 C.F.R. Part 300, *et seq.*, is a detailed set of regulations promulgated by the U.S. Environmental Protection Agency ("U.S. EPA") that set forth standards under which contaminated properties are to be characterized and cleaned up. *See, e.g., Carson Harbor Village Ltd. v. Unocal Corp.*,

287 F. Supp. 2d 1118, 1152 (C.D. Cal. 2003). Totaling approximately 275 pages of regulatory text, the NCP extensively details the roles of federal, state, and local governments in responding to contaminated sites, and establishes the procedures for making cleanup decisions. 40 C.F.R. Part 300; *See U.S. v. City of Denver*, 100 F.3d 1509, 1511 (10th Cir. 1996).

The chief goal of the NCP is to achieve a "CERCLA-quality cleanup." 40 C.F.R. § 300.700(c)(3)(i). The basic elements of CERCLA require that a remedy be protective of human health and the environment, utilize permanent solutions and alternative treatment technologies to the maximum extent practicable, and be cost effective. 42 U.S.C. § 9621(b)(1). An important component of the NCP is requiring community involvement and public comment. 40 C.F.R. § 300.415(n).

"Under the Supremacy Clause of the United States Constitution, state laws that "interfere with, or are contrary to the laws of Congress" are preempted and are therefore invalid." *Fireman's Fund Ins. Co. v. City of Lodi*, 302 F. 3d 928, 941 (9th Cir. 2002) ("*Fireman's Fund*"), citing *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1, 211 (1824). "Congressional intent governs our determination of whether federal law preempts state law. If Congress so intends, '[p]re-emption ... is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose. [Citations]" *Fireman's Fund*, 302 F. 3d at 941. When a state law stands as "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," the state law is preempted. *Fireman's Fund*, 302 F. 3d at 943, citing *California Fed. Sav. and Loan Ass'n v. Guerra*, 479 U.S. 272, 281 (1987). In finding that CERCLA preempted certain nonfederal legal provisions, the Ninth Circuit in *Fireman's Fund* warned plaintiffs that, while state statutes may provide an apparent "escape route" from the constraints of the NCP, "*litigants may not invoke state statutes in order to escape the application of CERCLA's provisions in the midst of hazardous waste*

litigation." 302 F. 3d at 947, fn. 15 (emphasis added).[130]

A remedy afforded by state law that is not consistent with the NCP necessarily constitutes an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. Obligations sought to be imposed on parties that are not consistent with, or necessary under, the requirements of the NCP impermissibly conflict with CERCLA.[131] Without NCP consistency, the state provisions conflict with the goal of timely and cost-effective cleanup of hazardous waste sites because of additional cost, complication, and interference with congressional priorities and order of operations established by statute and extensive regulation. *See Stanton Road Assoc, v. Lohrey Enter.*, 984 F.2d 1015, 1019 (9th Cir. 1993). The requirements also run afoul of constituting an "overly strict regulatory demand," which is disfavored in this federal circuit. *Fireman's Fund*, 302 F.3d at 947-48 (citing reports by the U.S. Senate, U.S. EPA, National Governors Association, and the U.S. Conference of Mayors).[132]

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[130] The Ninth Circuit's holding is consistent with cases from the Second, Third, Seventh, and Tenth Circuits and numerous District Court rulings. Twice, the Second Circuit has held CERCLA to preempt state law claims that would have allowed recovery without NCP compliance. In *Bedford Affiliates v. Sills*, the court found the state law remedies of restitution and indemnification to potentially interfere with a CERCLA policy. 156 F. 3d 416 (2d Cir 1998). This holding was later reaffirmed in *Goldman, Sachs & Co. v. Esso Virgin Is., Inc. (In re Duplan Corp.)*. 212 F. 3d 144, 150 fn. 7 (2d Cir. 2000). In deciding *In re Reading Company*, the Third Circuit found a conflict between CERCLA's settlement scheme and the state law remedies of contribution and restitution. 115 F. 3d 1111 (3d Cir 1997). The court reasoned that "[p]ermitting independent common law remedies would create a path around the statutory settlement scheme, raising an obstacle to the intent of Congress." *Id.* at 1117. In *PMC, Inc. v. Sherwin Williams Company*, the Seventh Circuit refused to allow a claim under Illinois law that could have allowed a contribution claim inconsistent with the NCP. 151 F.3d 610, 618 (7th Cir. 1998). The court found that, unlike the state law causes, the federal law encourages CERCLA-quality cleanups through consistency with the NCP. *Ibid.* Several years earlier, the Tenth Circuit noted that it "would be incongruous for federal law to bar private recovery unless there has been substantial compliance with the NCP, but then permit recovery under a contribution theory through mere compliance with less demanding state regulations." *County Line Investment Co. v. Tinney*, 933 F. 2d 1508, 1517, fn. 13 (10th Cir. 1991). Together, these cases constitute a significant body of law discouraging state law claims except in compliance with the NCP.

[131] While CERCLA's savings clauses allow some room for state regulation (and thus CERCLA does not preempt *the field* of hazardous waste cleanup), the basic rules of conflict preemption still remain. *See Fireman's Fund Ins. Co. v. City of Lodi*, 302 F.3d 928, 952, fn. 26 (9th Cir. 2002).

[132] Section 13304's water replacement provisions' inconsistency with the NCP also conflicts with the incentives for settlements imposed by CERCLA. Courts have found

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LOS ANGELES

(2) The federal District Court has twice ruled that the Water Purveyors may not evade the NCP

In adjudicating the City of Rialto's lawsuit, the court dismissed the City's state law claims finding that they were preempted by CERCLA and the NCP. *Rialto Dismissal*, 24. The court reasoned, "[i]f Plaintiffs' are allowed to pursue their state law tort claims, they *may be allowed to recover damages* without compliance with the National Contingency Plan." *Id.* (emphasis added.) Citing *Fireman's Fund*, the court concluded that the state law claims stood as an obstacle to the accomplishment and the execution of the full purposes and objectives of Congress. *Id.* Whether this ruling is applied to reimbursement for water already provided, reimbursement for groundwater investigation, or an order to provide water or wellhead treatment, the outcome is the same. All three types of relief constitute the same kind of cost recovery that concerned the court in the City of Rialto's federal case; if the State Board accords such relief, it would frustrate the goal of the NCP to achieve a timely and effective cleanup. Thus, the Advocacy Team's claims concerning water replacement must similarly be dismissed.

The federal district court also dismissed a lawsuit brought by the City of Colton finding the city had not complied with the NCP. Order Granting Defendants' Motion for Summary Judgment, or in the Alternative, for Partial Summary Judgment, *City of Colton v. American Promotional Events, Inc. – West, et al.*, Case No. CV 05-1479-JFW (SSx) (filed October 31, 2006) ("*Colton Dismissal*") Ex. 20333. In that case, the court dismissed the claims for water replacement because the City had not performed a number of actions that were required by the NCP. *Id.* at 1-10. The City should have (1) properly initiated a removal site evaluation, (2) reviewed the removal site evaluation, (3) properly determined a threat to public health or welfare as a result of actual or potential contamination of drinking water supplies, (4) conducted an engineering evaluation/ cost analysis, (5) developed a sampling and analysis plan, (6) conducted

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CERCLA to preempt other laws where settlements would be prejudiced by application of state law. *See, e.g., In re Reading Company*, 115 F.3d 1111, 1117 (3d Cir. 1997).

community relations planning, (7) determined the adequacy of community relations through outreach to specified persons, (8) formulated a formal community relations plan, and (9) solicited comments from the public concerning the engineering evaluation/ cost analysis, among other requirements. *Colton Dismissal*, 7-9 (citing various provisions at 40 C.F.R. § 300.415). *Id.* The court also noted that an additional precondition to valid claim for water replacement under the NCP was proof of the legal requirement to stop serving water from the impacted wells. *Colton Dismissal*, 9, fn. 12. Again, there is no evidentiary basis for making that finding in this proceeding.

(3) The City of Rialto is Collaterally Estopped from Advancing Claims Related to Water Replacement and Reimbursement

The City of Rialto, a designated party to these proceedings, is precluded by the doctrine of collateral estoppel from seeking the same claims that were defeated in the federal litigation. *City of Rialto v. U.S. Department of Defense, supra.* The City of Rialto cannot now attempt to avoid the NCP and "back door" its recovery for alleged water replacement costs under state law in direct contravention of the District Court's ruling dismissing its state claims. In other words, the City is not allowed a second bite at the apple, and the Hearing Officer should not endorse the City's transparent forum shopping.

The City makes no secret of its attempt get relief through the State Board proceedings for which it have been unsuccessful in federal district court. The City of Rialto and the Advocacy Staff have confirmed that they have a joint prosecution agreement. *See, e.g.,* Transcript of Proceedings, March 15, 2007, *City of Rialto, et al., v. United States Department of Defense, et al.*, No. CV-00079 PSG (SSx), 24:17-25:3. Ex. 20357. Utilizing the State Board proceedings to get relief is a key element of the City of Rialto's strategy:

> The second prong of Rialto's plan is to provide evidence gathered from discovery in the litigation to the Santa Ana Regional Water Quality Control Board for its use in Administrative Proceedings against the potentially responsible parties to compel them to investigate and clean up the perchlorate in the Rialto Basin. Rialto

> is working cooperatively with the Water Quality Board to support its issuance of "Clean Up and Abatement Orders" or CAOs. . . the benefits of the lawsuit have just begun. The City is currently cooperating with the Regional Water Quality Control Board in its upcoming proceedings to issue Clean Up and Abatement Orders against other corporate polluters, including Black & Decker, Inc., Emhart Industries, Inc., B.F. Goodrich and Pyro Spectaculars, Inc. On October 13, 2006, the Regional Water Quality Control Board adopted a resolution appointing a hearing officer, and ordering the commencement of the proceedings against these very parties. The City of Rialto has joined the proceeding to assist in the prosecution of the polluters. "The City's Perchlorate Clean-Up Plan," City of Rialto Website, http://www.rialtoca.gov/perchlorate/water_rialto-perchlorate-plan.php

However, "Collateral estoppel precludes a party to an action from re-litigating in a second proceeding matters litigated and determined in a prior proceeding." *People v. Sims*, 32 Cal. 3d 468, 477 (1982). The first judgment operates as a conclusive adjudication as to such issues in the second action as were actually litigated and determined in the first action. *Clark v. Lesher*, 46 Cal. 2d 874, 880 (1956). When an issue was decided in prior litigation, collateral estoppel applies to conclusively determine those issues against the party in a subsequent lawsuit on a *different* cause of action. *Vandenberg v. Superior Court*, 21 Cal. 4th 815 (1999), citing *Teitelbaum Furs v. Dominion Insurance Co.*, 58 Cal. 2d 601,604. Because the City of Rialto is bound by the federal determination, it necessarily is bound by that determination in this forum. *See Vandenberg*, 21 Cal. 4th at 828, citing *Lucido v. Superior Court*, 51 Cal. 3d 335, 341 (1990). Collateral estoppel may be applied nonmutually, and thus it is not necessary for this proceeding to include parties identical to the federal action for the City of Rialto to be precluded from raising these issues before the State Board. *See Vandenberg*, 21 Cal. 4th at 828.[133]

[133] Additionally, as here, where the City of Rialto sits as a prosecutor, use of collateral estoppel vindicates the policy behind the doctrine, which is to promote judicial economy and protect litigants from harassment by vexatious litigation. *Vandenberg*, 21 Cal. 4th at 829. Allowing the City of Rialto to relitigate their claims in this forum is contrary to this policy.

c. The Advocacy Team Has Not Proven That Wells are "Affected" by Goodrich

Section 13304(a) provides that a "cleanup and abatement order issued by the state board or a regional board may require the provision of, or payment for, uninterrupted replacement water service, which may include wellhead treatment, to each affected public water supplier or private well owner." In the proposed CAO and in their Points and Authorities, the Advocacy Team has not proven that any well owner has been "affected" by a discharge caused by Goodrich.

The Advocacy Team nebulously claims that a condition of pollution or nuisance exists because there has been an interference with municipal and beneficial uses ("MUN") of the groundwater. Ad. Team P&As, p. 12. However, not only must the Advocacy Team prove the elements of a Cleanup and Abatement Order, as discussed above, but it must (and has not) further demonstrated that *Goodrich's discharge* has affected the drinking water well(s), including that Goodrich's discharge has contaminated the well to a degree constituting "pollution" or "nuisance."

Nor does the Advocacy Team point to any violation of the Basin Plan. While the Advocacy Team points to the bounds of Regional Board regulatory authority as the reasonable protection of beneficial uses through establishment and enforcement of water quality objectives adopted in regional water quality control plans (Water Code §§ 13240-13247, 13263), it fails to specify which applicable water quality objectives have been violated Goodrich, or how the asserted beneficial use has been specifically impaired by Goodrich.[134]

d. Water Replacement Cannot be Ordered Where No Water Standards Are Exceeded

Citing *Olin Corp. and Standard Fusee Corp.* WQ 05-07 (2005), the Advocacy

[134] The MUN beneficial use dictates that groundwater in the Rialto and Colton subbasins meet certain narrative and numeric objectives. *Santa Ana River Basin Water Quality Control Plan*, pp. 4-13, 4-14, 4-39, *available at* http://www.waterboards.ca.gov/santaana/html/basin_plan.html ("Basin Plan").

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Team seeks to order Goodrich to provide water replacement for water that contains perchlorate above the unenforceable Public Health Goal (PHG) of 6 ppb established by the California Office of Environmental Health Hazard Assessment (OEHHA). Ad. Team P&A's, 106; Draft CAO, ¶ 65 and 66. However, both the *Olin* Order and the Advocacy Team are wrong as a matter of law.[135] No water replacement order may be issued for perchlorate without an enforceable standard (*i.e.*, an MCL). The Advocacy Team further concedes that only one well subject to the Proposed CAO contains TCE above its MCL. Draft CAO, ¶ 56. Until an MCL is issued for perchlorate, there is no authority for water replacement orders under Water Code Section 13304.

As the State Board recognized in *Olin*, "there is currently no enforceable state or federal standard for perchlorate in drinking water for use in determining when a well is affected such that the use should be entitled to replacement water service." *Olin Corp. and Standard Fusee Corp.* WQ 05-07 (2005) at 3. To date, no MCL for perchlorate has been developed by either DHS or the U.S. EPA.[136] DHS is responsible for adopting these legally binding and enforceable standards and has been specifically charged with developing an MCL for perchlorate. Health & Safety Code § 116293(b). An MCL is defined as the "primary drinking water standard for contaminants in drinking water." While the MCL is to be set at a "level that is as close as feasible to the corresponding PHG, placing primary emphasis on the protection of public health," it by no means will necessarily be at the same level of the PHG. *Id.* § 116365(a). The MCL constitutes "the level of contaminants that, in the judgment of the department, may have an adverse effect on the health of persons" and is the maximum permissible level of a contaminant

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[135] A reviewing court would not accord deference to the State Board because it is exercising regulatory control out of its jurisdiction. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984) (establishing that deference is given to an agency construing a statute that *it administers*).

[136] However, in January 2006, EPA promulgated guidance for the assessment of perchlorate as part of NCP activities that identified the "to be considered" level as the drinking water equivalent level of 24.5 micrograms per liter (24.5 parts per billion or "ppb"). "Memorandum: Assessment Guidance for Perchlorate," U.S. EPA, January 26, 2006.

in water. *Id.* § 116275 subd. (c), (f).

Reliance on the PHG instead of an MCL, which is not a standard, runs contrary to Water Code Section 13304(f) and Health & Safety Code § 116365(c)(2), which prohibits both OEHHA and the California Department of Health Services (DHS) from imposing a mandate on a public water system based on a PHG. In fact, the State Board, the Regional Board, and OEHHA are not authorized to regulate drinking water, which is the exclusive realm of DHS. Health and Safety Code Section 116350(a) mandates that *DHS* "shall administer the provisions of this chapter and *all other provisions relating to the regulation of drinking water to protect public health*" (emphasis added).

Additionally, the use of the PHG runs contrary to the express guidance of OEHHA, which provides:

> A PHG represents a health-protective level for a contaminant that DHS and California's public water systems should strive to achieve if it is feasible to do so. However, a PHG is not a boundary line between a "safe" and "dangerous" level of a contaminant, and drinking water can still be considered acceptable for public consumption even if it contains contaminants at levels exceeding the PHG. As long as drinking water complies with all MCLs, it is considered safe to drink, even if some contaminants exceed PHG levels. *Frequently Asked Questions (FAQs) About the Public Health Goal for Perchlorate*, OEHHA, March 11, 2004.

Likewise, the DHS "notification level" for perchlorate of 6 ug/L in drinking water cannot be relied upon as a standard for issuance of water replacement order. DHS' own recommendations with respect to its notification levels runs contrary to using the equivalent notification level for perchlorate as the "standard" for water replacement. When exceeded, notification levels only require a drinking water system to notify the governing body of the local agency in which users of the drinking water reside. Health and Safety Code § 116455. Notification levels are advisory levels and not enforceable standards.[137]

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[137] *See, e.g.*, http://www.dhs.ca.gov/ps/ddwem/chemicals/al/default.htm#REQUIREMENTS%20AND%20RECOMMENDATIONS.

Rather, DHS recommends that if a chemical is present in drinking water that is provided to consumers at concentrations considerably greater than the notification level, that the drinking water system take the source out of service depending upon the toxicological endpoint that is the basis for the notification level, ranging from 10 to 100 times the notification level.[138] *Id.* This DHS response level for perchlorate is ten times the notification level, or 60 micrograms (µg) per liter. *Drinking Water Notification Levels and Response Levels: An Overview*, California Department of Health Services—Drinking Water Program, p. 2, *available at* http://www.dhs.ca.gov/ps/ddwem/chemicals/AL/PDFs/notificationoverview.pdf. Further, neither the Advocacy Team nor the State Board have proffered any evidence to demonstrate that 6 ug/L is an appropriate standard. The evidence is to the contrary. Borak Dec. ¶ 37-42.

Finally, none of the parties have adduced evidence concerning the background condition of the drinking water prior to the alleged discharges. Water Code § 13304(f). The Advocacy Team has failed to demonstrate whether any of the levels of perchlorate found in the wells at issue are over and above the background levels for the basin or what levels existed prior to the time of the alleged discharges.

D. An Order Pursuant To Water Code Section 13267 Is Inappropriate

The Advocacy has neither properly plead nor demonstrated that an order pursuant to Water Code Section 13267 is appropriate. After years of voluntary investigation and expending millions of dollars, Goodrich has exceeded any conceivable obligation it could have as a suspected discharger in light of the associated burden.

Pursuant to Water Code Section 13267(a):

[138] For chemicals with a non-cancer toxicological endpoint, the recommendation occurs at 10 times the notification level. For chemicals considered to pose a cancer risk, the recommendation occurs at 100 times the notification level. Department of Health Services Website, *available at* http://www.dhs.ca.gov/ps/ddwem/chemicals/al/default.htm#REQUIREMENTS%20AND%20RECOMMENDATIONS (last visited April 10, 2007).

> "the regional board may require that any person who has discharged, discharges, or is suspected of having discharged or discharging . . . to furnish, under penalty of perjury, technical or monitoring program reports which the regional board requires. *The burden, including costs, of these reports shall bear a reasonable relationship to the need for the report and the benefits to be obtained from the reports.* In requiring those reports, the regional board shall provide the person with a written explanation with regard to the need for the reports, and shall identify the evidence that supports requiring that person to provide the reports." Water Code § 13267(b)(1). (emphasis added.)

Before Section 13267 can never be applied to this matter, several statutory prerequisites must yet be satisfied. First, the Advocacy Team or State Board must overcome the presumption against retroactive application of the statute. For the same arguments advanced regarding the retroactive application of Section 13304 to Goodrich's acts, Section 13267 similarly does not, and cannot, operate retroactively. *See* Section XIV(B)(2), *supra*. Each of the parties to this proceeding have the right to "have liability-creating conduct evaluated under the liability rules in effect at the time the conduct occurred," unless the Legislature has specifically abrogated that right. *Californians for Disability Rights*, 39 Cal. 4th at 233, citing *Elsner, Tapia, and Aetna, supra*. Section 13267 was enacted in 1969, whereas Goodrich operated on the subject property from 1957 to early 1964. In the absence of an express indication that Section 13267 was to have retroactive effect, the statute cannot survive the presumption against it. Similarly, any prior manifestations of Section 13267 do not authorize the Regional Board to order Goodrich to do anything decades after.

As with Section 13304, imposition of the statute retroactively implicates the same constitutional takings and due process concerns when huge financial burdens are imposed on entities that were in full compliance with the law actually in force at the time. *Myers*, 28 Cal. 4th 828, 845-846. Also similar to Section 13304, there is no indication in Section 13267 that it can be used jointly and severally in a manner that asks one discharger to investigate the discharges of others. *See* Section XIV(E). Concerning the same matter as this proceeding, when reviewing a prior challenge to the Water Boards'

Section 13267 authority by the Emhart Parties, where it rejected the Regional Board's order, the Riverside Superior Court stated:

> The far more difficult question is whether or not the statute as applied in this particular case afforded Petitioner [Emhart] both substantive and procedural due process....the more onerous the burden created by the § 13267 order, the greater the procedural due process requirements.... The requirements of Due Process will depend on the circumstances of each case. Factors might include: (1) the size of the burden in producing the requested reports; (2) the scope of the danger to public health if the reports are not produced; (3) the immediacy of the danger to public health if the reports are not produced; whether the required testing is to be performed solely on the property owned by the entity being ordered to do the testing, or whether the § 13267 order seeks testing on other property.[139]

Statement of Decision, *Emhart Industries, Inc. vs. California Regional Water Quality Control Board*, Riverside County Superior Court, Case No. RIC 397528 (filed November 8, 2004).

In addition, the Advocacy Team must identify the "plan or requirement" to which the Advocacy Team is responding under Section 13267(a). There is also no authority that Section 13267 orders are appropriate in this context. The CAO does not pertain to a *water quality control plan and waste discharge requirements* as set forth in Section 13267(a).[140] *See, e.g., City of Arcadia v. State Water Resources Control Bd.*, 135 Cal. App. 4th 1392, 1413-14 (2006) (finding that Water Code Section 13267 did not apply to the Los Angeles Regional Board's adoption of a program designed to cleanup trash in the Los Angeles River and embodied in an *amendment to the water quality control plan*).

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[139] The court noted in a footnote that "[a]n order that someone pay for testing on other people's property, however, can only be justified by a finding that the entity paying for the testing is somehow responsible for the need for the testing."

[140] In addition, any ultimate order relying on Section 13267 authority must be consistent with being a "technical or monitoring program report." § 13267(b)(1). The Advocacy Team's Points and Authorities appear to require the parties to conduct further *investigations*. Ad. Team P&As, pp. 106-108. Logically, "technical or monitoring program reports" are data that help inform an "investigation." Instead, the Advocacy Team seeks to have the parties conduct the entire investigation that is authorized by Section 13267(a), as opposed to providing simple reports that would aid the State in investigating. The term "technical or monitoring program report" more aptly refers to the compilation of already-existing data, rather than the task of completing full studies in the place of the state.

The Advocacy Staff has also failed to meet, and cannot do so, the balancing test set forth in Section 13267. Significantly, the Advocacy Team has not performed any transparent balancing of burden and benefit as required under Section 13267(b)(1). Goodrich has conducted extensive soil and groundwater investigation on the 160-acre parcel and throughout the Rialto basin and has expended millions of dollars doing so. Yet, even after these extensive studies pursuant to work plans reviewed and approved by the Regional Board and the U.S. EPA, the Advocacy Team admits that (1) there is still no proof of a discharge to water from Goodrich (Saremi Dep., 656:19-24; Sturdivant Dep., 717:15-24; Holub Dep., 933:8-23, 934:10-20. 935:2-5, 93:10-15, 984:25-985:4, 985:18-21, 988:20-23), and (2) the Advocacy Team does not know what future steps to take to identify the causes or sources. *See* Holub Dep., 933:8-23, 934:10-20. 935:2-5, 93:10-15, 984:25-985:4, 985:18-21, 988:20-23.

Goodrich's efforts to date far exceed what the Boards can reasonably request of it. The burden imposed upon Goodrich has already vastly exceeded that permitted under any reading of Section 13267. As a "suspected discharger" only, Goodrich has already more than met any and all purported obligations under Section 13267 and there is no authority to order it to do anything more pursuant to Section 13267.

E. Goodrich Is Not Subject To Joint And Several Liability

On the second to last page of their written submission, and without citation to legal authority, the Advocacy Team suggests that any potential order should impose a joint and several obligation on the alleged dischargers. Ad. Team P&As, 108-109. There is no authority for this proposition. To start with, the text itself of Section 13304 imposes a several obligation. Second, "severable" liability is appropriate when any injury is divisible, as is the case here if there are violations of Section 13304. Finally, as entities that contributed the perchlorate contamination, the Regional Boards is estopped from imposing joint and several liability.

1. Section 13304 Imposes a Several Obligation Only

California law provides for three types of legal obligations: joint, several, and joint

and several. Civ. Code § 1430. California law imposes a general presumption against joint and several obligations unless there are express words to the contrary. Civ. Code § 1431. The interpretation of a several obligation, rather than a joint and several one, is consistent with the policy adopted by the People of California, as codified at Civil Code § 1431.1, viewing the imposition of joint and several liability as frequently inequitable and unjust.

Section 13304 imposes only a several obligation. The text of Section 13304 clearly requires the Regional Board to demonstrate that *each* discharge of waste causes or permits, or threatens to cause of permit, the waste to be discharged or deposited where it is, or probably will be, discharged into waters of the state and creates, or threatens to create, a condition of pollution or nuisance. Section 13304(a) further provides that such person "shall upon order of the regional board, clean up *the waste* or *abate the effects* of *the waste* . . ." The language of the statute does not state that each proven discharger shall be responsible for cleaning up and abating the waste caused by all other discharges that ever occurred on the site.

The creation of a several obligation is further evidenced by the conspicuous lack of text in section 13304 making reference to or intention to impose a "joint and several" obligation. In fact, the statute is devoid of any mention of a joint and several obligation which would be an obvious and necessary requirement for the imposition of such liability.

2. Severable Liability Is Further Appropriate Because the Injury Imposed is Divisible

The evidence demonstrates, and Regional Board staff concede, that the appearance of perchlorate in the Rialto area's groundwater is likely to have come from a number of separate actions taken over decades by operators of various industries in different places in the greater Rialto area.

a. Traditional Tort Principles Dictate that Liability Is Severable In This Proceeding

Where an injury is *distinct* or *divisible*, the liability of a defendant is severable and

the defendant is responsible for remedying only that portion of the injury. Restatement (Second) of Torts § 433A.[141] "Comment b" of section 433A of the Restatement addresses "distinct harms":

> There are other results which, by their nature, are more capable of apportionment. If two defendants independently shoot the plaintiff at the same time, and one wounds him in the arm and the other in the leg, the ultimate result may be a badly damaged plaintiff in the hospital, but it is still possible, as a logical, reasonable, and practical matter, to regard the two wounds as separate injuries, and as distinct wrongs. The mere coincidence in time does not make the two wounds a single harm, or the conduct of the two defendants one tort. There may be difficulty in the apportionment of some elements of damages, such as the pain and suffering resulting from the two wounds, or the medical expenses, but this does not mean that one defendant must be liable for the distinct harm inflicted by the other.

"Comment d" of section 433A of the Restatement addresses "divisible harms:"

> There are other kinds of harm which, while not so clearly marked out as severable into distinct parts, are still capable of division upon a reasonable and rational basis, and of fair apportionment among the causes responsible. Thus where the cattle of two or more owners trespass upon the plaintiff's land and destroy his crop, the aggregate harm is a lost crop, but it may nevertheless be apportioned among the owners of the cattle, on the basis of the number owned by each, and the reasonable assumption that the respective harm done is proportionate to that number. Where such apportionment can be made without injustice to any of the parties, the court may require it to be made.

The Advocacy Staff has not put forth any evidence in this proceeding demonstrating the Goodrich has caused an indivisible harm in the first place. Moreover, the facts show that any perchlorate contamination that could be conceivably attributed to Goodrich's operations would be at best limited to shallow soil contamination and easily capable of apportionment under the rationales of the Restatement, and thus that liability is

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[141] It is well-documented that courts during the era when Goodrich operated relied on the Restatement (Second) of Torts. Carlotto, Ltd. v. County of Ventura, 47 Cal. App. 3d 931 (1975) (embracing the Restatement (Second)'s Section 433A and stating that it is in accord with the law as enunciated in *Fibreboard Paper Products Corp. v. East Bay Union of Machinists*, 227 Cal. App. 2d 675 (1964)); Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121 (1972) (embracing Restatement (Second) of Torts Section 402A regarding product liability); *Van Arsdale v. Hollinger*, 68 Cal. 2d 245 (1968) (finding support in the Restatement (Second) for ruling on nonliability of independent contractors). While the Restatement (Second) was not published until 1965, it would have accounted for the developments in law during the period in which Goodrich operated in Rialto.

severable from liability for other areas on the 160-acre site or for the groundwater.

b. Liability Under California's Principal Hazardous Waste Remediation Law is Apportioned According to Fault

The policy of the State is clearly set forth by the Legislature in the Carpenter-Presley-Tanner Hazardous Substance Account Act ("HSAA"), California's principal law for the remediation of hazardous waste sites. Health and Safety Code §§ 25300-25395.45. Liability under the HSAA is apportioned according to fault:

> (a) Except as provided in subdivision (f), any party found liable for any costs or expenditures recoverable under this chapter who establishes by a preponderance of the evidence that *only a portion of those costs or expenditures are attributable to that party's actions, shall be required to pay only for that portion.*
>
> b) Except as provided in subdivision (f), if the trier of fact finds the evidence insufficient to establish each party's portion of costs or expenditures under subdivision (a), the *court shall apportion those costs or expenditures, to the extent practicable, according to equitable principles, among the defendants.*
>
> * * *
>
> (f) Notwithstanding this chapter, any response action contractor who is found liable for any costs or expenditures recoverable under this chapter and who establishes by a preponderance of the evidence that *only a portion of those costs or expenditures are attributable to the response action contractor's actions, shall be required to pay only that portion of the costs or expenditures attributable to the response action contractor's actions.*

Health and Safety Code § 25363 (emphasis added). There is no valid reason for the State Board to diverge from the State's approach to hazardous waste sites that are remediated under the Health and Safety Code.

3. The State Board Is Estopped from Imposing Joint and Several Liability

The State is estopped from imposing joint and several liability on the parties in this matter because of its contribution to perchlorate in the groundwater. *See also* Section XVI, *supra*. Both the doctrine of unclean hands and the principles behind joint and several liability compel this conclusion. The State's actions in exacerbating perchlorate contamination preclude it from seeking full payment from other entities. The

parties to this proceeding cannot be found to be subject to Section 13304, without the State also being found to be subject the section and having liability.

a. The State's Actions Concerning the McLaughlin Pit and Robertson's Ready-Mix

As further discussed below (*See* Section XV, *infra)*, the evidence demonstrates that the Regional Board permitted discharges to occur from the McLaughlin Pit and was instrumental in permitting a gravel washing operation ("Robertson's Ready-Mix") involving unlined settling ponds located directly over historical bunkers known to contain perchlorate.

(1) McLaughlin Pit

The evidence brought forth in this proceeding demonstrates that the McLaughlin Pit is the only confirmed source to reach groundwater on the 160-acre parcel. *See* Section IV, *supra*. As further addressed below, the McLaughlin Pit was a Class I hazardous waste disposal pit located on the 160-Acre Site, into which Regional Board staff negligently permitted fireworks manufacturers to dump many thousands of pounds of perchlorate waste flooded with tens of thousands of gallons of water annually for 16 years (approximately 1971-1987) in violation of Regional Board's own waste discharge requirements. *Id.* In or about 1987, the Regional Board failed to ensure that the McLaughlin Pit was closed in accordance with the law. *Id.*

On November 14, 1971, the Regional Board issued Waste Discharge Requirements ("WDRs"), which authorized the construction and operation of the proposed waste disposal pit. The disposal pit, constructed by a swimming pool contractor, was 20' x 20' x 4' and had a 12,000 gallon capacity. Although the WDRs required it to have an impervious lining, the "pit" installed was simply a plastered gunite swimming pool without any liner. *Id.*, Exs. 3543, 3545. The WDRs expressly prohibited "all discharge of waste to surface waters, surface water drainage courses or areas which would allow percolation of waste" and also required the owner to file quarterly monitoring reports which were to contain monthly daily averages of waste flows to the pit and to

record of the depth of the waste in the pit. The WDRs were initially issued with the understanding that 150 gallons of manufacturing waste would be discharged to the pit per day. *Id.* By 1978, however, Apollo reported that its discharge had increased to 3,000 gallons per day, which the Regional Board approved when it reissued the WDR. Ex. 10365.

During their depositions, neither Mr. Thibeault nor Mr. Berchtold could explain where all the waste water, laden with perchlorate, went, given that in 1978 Apollo had reported and staff confirmed that 3,000 gallons of waste materials per day were being discharged to the 12,000 gallon swimming pool pit. Thibeault Dep., 138:22-139:3; Berchtold Dep. 143:9:147:7. The Regional Board's records reveal numerous, repeated monitoring report violations. Ex. 20006; Ex. 20007; Ex. 20018; Ex. 20019; Ex. 20020. The records also contain a number of reported Regional Board staff observations of violation of the freeboard requirement. *Id.*, Ex. 20020. Despite these facts, *the Regional Board files on the McLaughlin Pit contain no record of any enforcement action taken as a result of any of the numerous violations of the WDRs.* The WDRs were rescinded without any action in 1991.

Perhaps most egregious, in a further act of gross negligence, the Regional Board did not require the Pit to be properly closed as mandated by Subchapter 15 of the State Water Board's regulations, which required testing of groundwater for potassium perchlorate prior to closure. *See* Section IVC3, *supra*. The Regional Board also permitted the Pit to operate illegally for two years after the then-owner claimed the pit was closed. *See* Section IVC3, *supra*.

(2) Robertson's Ready-Mix

The second confirmed source of perchlorate contamination in Rialto, is the Robertson's Read-Mix operations. In 1999, two years after the discovery of perchlorate in the Rialto-Colton Groundwater Basin, the Regional Board staff approved a soil washing operation proposed by the County of San Bernardino and its contractor Robertson's in connection with its expansion of the County's landfill, which permitted

millions of gallons of water to mobilize perchlorate and to be discharged to the groundwater. The County, through Robertson's, proposed a massive excavation project which included soil washing and the installation of four unlined settling ponds, each 200' x 250' to 350' x 10' with a capacity of 13 million gallons. Ex. 20083. The direct causal connection between the mobilization of massive release of perchlorate to the groundwater by the millions of gallons of water discharged to the settling ponds was confirmed by Advocacy Team member Thibeault during his March 16, 2007 deposition. Thibeault Dep., 53 ("I believe that the wash water from the aggregate operation mobilized perchlorate in the sub surface and pushed it down towards the groundwater."). On March 16, 2001, less than two years after Regional Board staff authorized the construction of four unlined settling ponds, and four years after discovery of perchlorate in the Basin, the County wrote the Regional Board a letter which advised that perchlorate was being detected in increasing numbers in a monitoring well immediately down gradient of the ponds. Ex. 20349. In that letter, the county reported increasing perchlorate concentrations, starting with 1.9 ppb in April 2000 and ending with 250 ppb in January 2001. One month later, on April 17, 2001, the County again wrote the Regional Board a letter which restated its concern about the rising perchlorate concentrations. This letter added the following critical information: the rising perchlorate concentrations had been detected in a monitoring well down gradient of Robertson's settling ponds and urged prompt action. Ex. 20101. Mr. Thibeault finally ordered the County to investigate releases of perchlorate to the groundwater (then at a concentration of 800 ppb) mobilized by Robertson's settling ponds. By January 2003, the monitoring well down gradient of the settling ponds reported a concentration of 1,000 ppb of perchlorate. Ex. 20325, CAO R8-2003-0013, Finding 9.

b. The State Has Violated Section 13304 and Must Share Liability

Under Section 13304, the State must share liability with all found to be responsible in this proceeding. Water Code Section 13304(a) provides in pertinent part,

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that "[a]ny person who . . . has caused or permitted . . .any waste to be discharged or deposited where it is, or probably will be, discharged into the waters of the state and creates, or threatens to create, a condition of pollution or nuisance, shall upon order of the regional board, clean up the waste or abate the effects of the waste. . . ." The word "person" is defined at Section 13050(c) to include "the state." The words "permit" or "permitted" are not defined in the statute. Thus, they must be given their ordinary dictionary meaning. Black's Law Dictionary defines "permit" in its verb form to mean: "To suffer, allow, consent, let; to give leave or license; to acquiesce, by failure to prevent, or to expressly assent or agree to the doing of an act." *Black's Law Dictionary*, p. 789 (Abridged 6th ed. 1991). Separately, Government Code § 815.6 provides:

Where a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty.

Thus, because the State is a "person" under Section 13304, and can "permit" discharges within the meaning of the statue, the State too must be held liable if the other parties to this proceeding are found to have violated the statute.

c. The State Is Now Estopped from Seeking and Imposing Joint and Several Liability

The doctrine of unclean hands is invoked when a plaintiff or prosecutor "has violated conscience, or good faith, or other equitable principle, in his prior conduct." *General Electric Co. v. Superior Court of Alameda County*, 45 Cal. 2d 897 (1955), citing *DeGarmo v. Goldman*, 19 Cal. 2d 755, 765 (1942), quoting from Pomeroy's Equity Jurisprudence, § 397. The doctrine can only be invoked when the prosecutor's misconduct relates directly to the subject of the complaint. *Lynn v. Duckel*, 46 Cal. 2d 845 (1956). Here, one of the prosecutors in these proceedings, the Advocacy Team, has contributed to the very same wrong it now accuses Goodrich and others of having performed. The wrongs committed by the Advocacy Team must be imputed to the State.

The doctrine of unclean hands thus applies to limit the ability of the State to prosecute Goodrich under joint and several liability. Adopting similar principles, in *Fireman's Fund,* the Ninth Circuit held that the City of Lodi could not imposed joint and several liability on parties found liable under it's municipal hazardous waste ordinance (i.e., MERLO). The Court of Appeals held that, if the City could be considered a potentially responsible party, it was prohibited from bringing a cost recovery action that would impose joint and several liability on other parties pursued by the City. *Fireman's Fund,* 302 F. 3d at 947, citing *Pinal Creek Group v. Newmont Mining Corp.*, 118 F. 3d 1298, 1301 (9th Cir. 1997). The court reasoned that allowing a party responsible for part of the contamination to impose joint and several liability on others would result in unfair cost shifting, inefficiency, and prolonged litigation. *Id.* Under these principles, the State must also be prohibited from imposing joint and several liability. Like the City of Lodi, the State should be prohibited from imposing joint and several liability where such enforcement results in unfair cost shifting and prolonged litigation. Because the State is responsible for the well-documented discharges to groundwater from the McLaughlin Pit, as well as the discharges from Robertson's Ready-Mix, the State must shoulder its fair share of responsibility and not be allowed to shift all costs in this proceeding.

F. The Statute Of Limitations Precludes This Action And The Equitable Doctrine Of Laches Estops The State Board From Issuing A Cleanup And Abatement Order

The applicable statute of limitations and the doctrine of laches bar the State Board from enforcing Sections 13304 and 13267 against Goodrich. Of course, the Regional Board has known about Goodrich's operations in Rialto for over three years – its "star witness," Mr. Polzien, was first deposed in 2003. The State Board's actions in this proceeding have begun nearly a decade after discovery of this information. Moreover, information received since initial discovery only tends to exculpate Goodrich from liability.

California Code of Civil Procedure Section 338(i) provides a three-year statute of limitations for:

> An action commenced under the Porter-Cologne Water Quality Control Act (Division 7 (commencing with Section 13000) of the Water Code). The cause of action in that case shall not be deemed to have accrued until the discovery by the State Water Resources Control Board or a regional water quality control board of the facts constituting grounds for commencing actions under their jurisdiction.[142]

By its own admission, the Regional Board and Advocacy Team became aware in 1997 of the perchlorate contamination and discovered in 1998 that Goodrich had operated a solid propellant facility on the Site. Thibeault Dep., 11:1-14:25; Holub Dep., 16:23-17:8; Saremi Dep., 393:6-10, 488:6-24. Yet, nearly a decade later, the Regional Board now seeks to take action against Goodrich.[143]

Further, the Regional Board is barred from acting by the doctrine of laches. *Fountain Valley Regional Hospital and Medical Center v. Bonta*, 75 Cal. App. 4th 316, 323-325 (1999) (In cases in which a party asserts doctrine of laches as a bar to a claim by a public agency, and no statute of limitations directly applies but there is a statute of

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[142] At least one of the State Board's previous interpretations of this provision claims that Code of Civil Procedure Section 338 does not apply to cleanup and abatement orders because subdivision (i) only applies to "civil actions" which are actions in court and that there is no statute of limitations applicable to State and Regional Board enforcement orders. *In the Matter of the Petition of Trans-Tech Resources, Inc.*, Order No. WQ 89-14 (1989). The interpretation of "action" in Section 338 to be a "civil action" is unsatisfactory for a number of reasons, including that it is inconsistent with the use of the term "action" under the Porter-Cologne Water Quality Control Act, such as the mandate that parties must petition the State Board to review a "regional board's action." Water Code § 13320. As importantly, the State Board's interpretation ignores the Legislature's purpose and intent in enacting statutes of limitation (for example, encouraging diligent and timely prosecution and providing finality and predictability in legal affairs). *See also* Footnote 141. The State Board's interpretation is nonsensical in that it would subject entities to agency power and process in cases where the agency would be powerless to enforce the order in court.

[143] *See, e.g., Wilshire Westwood Assoc. v. Atl. Richfield Co*, 20 Cal. App. 4th 732, 740 (1993) ("A plaintiff is charged with 'presumptive' knowledge so as to commence the running of the statute once he or she has notice or information of circumstances to put a reasonable person on inquiry, or has the opportunity to obtain knowledge from sources open to his investigation." [Citations omitted.]) *See, also, Kaiser Foundation Hospitals v. Workers' Compensation Appeals Board*, 39 Cal. 3d 57, 62 (1985) ("The purpose of any limitations statute is to require diligent prosecution of known claims thereby providing necessary finality and predictability in legal affairs . . . ."); *Douglas v. Douglas* (1951) 103 Cal. App. 2d 29, 34 35 (The policy of the law is to prevent stale claims from springing up after the lapse of long periods of time and pursuant to this policy, statutes of limitations are enacted on the presumption that one having a well-founded claim will not delay enforcing it beyond a reasonable time. [citations omitted])

limitations governing an analogous action at law, the period may be borrowed as a measure of the outer limit of reasonable delay in determining laches; whether or not such a borrowing should occur depends upon the strength of the analogy.) At this time, now almost a decade after discovery of perchlorate, the Water Boards have unreasonably delayed in issuing an order.

G. *Res Judicata* And Collateral Estoppel Preclude The State Board From Issuing A New Cleanup And Abatement Order

The Advocacy Team and State Board are barred by the doctrines of res judicata and collateral estoppel from imposing a new Cleanup and Abatement Order in this proceeding. On June 6, 2002, the Regional Board *issued* a Cleanup and Abatement order to Goodrich. CAO No. R8-2002-0051. The 2002 CAO alleged perchlorate discharges from Goodrich and required investigation and cleanup. On September 13, 2002, the matter was heard before the Regional Board. Prior to the hearing, the parties submitted hearing briefs and advance written testimony. At the hearing, the Regional Board presented its case, primarily through the testimony of its Executive Officer, Assistant Executive Officer, and two staff members. The staff members were cross-examined. Goodrich also presented the testimony of expert witnesses. After presentation of the evidence was concluded, the Regional Board rescinded the CAO.

It has long been settled that the doctrine of *res judicata* can be applied in the administrative context provided certain elements are met. *U.S. v. Utah Construction Mining Co.*, 384 U.S. 394, 421-22 (1966); *Brosterhous v. State Bar*, 12 Cal. 4th 315, 325 (1995); *People v. Sims*, 32 Cal. 3d 468, 485 (1982). First, the administrative agency must be acting in a judicial capacity. *Id.* Next, the agency must resolve disputed issues before it and render a final decision. *Id.* Finally, the parties must have had an adequate opportunity to litigate the matter. *U.S. v. Utah Construction Mining Co.*, 384 U.S. 394, 421-22 (1966); *Brosterhous v. State Bar*, 12 Cal. 4th 315, 325 (1995); *People v. Sims*, 32 Cal. 3d 468, 479 (1982).

For purposes of these administrative proceedings, res judicata effect must be

given to the 2002 cleanup and abatement proceeding as *against* the Regional Board and State Board sitting in its stead. The Regional Board and now State Board are obviously pursuing the very same claim today under the Water Code as in 2002. The formal nature of the proceeding in 2002 provided a forum where the issue was "litigated," as that term is recognized in California's doctrine of res judicata and collateral estoppel. The Regional Board's decision to rescind the 2002 CAO was a judgment on the merits. Today, the Regional Board is asserting the *same claims* against Goodrich. Finally, all parties were given a fair opportunity to be heard on this issue in 2002. Thus, res judicata effect must be given to the Regional Board's 2002 decision.

XV. GOODRICH WAS COMPLYING WITH FEDERAL GOVERNMENT REQUIREMENTS AND IS NOT LIABLE UNDER CONFLICTING STATE LAWS

The Advocacy Team's allegations against Goodrich must also be rejected because, as a former contractor with the United States military, Goodrich's actions were governed by applicable federal standards and obligations that controlled the disposal of ammonium perchlorate and solvents contaminated with solid-rocket propellant. The evidence conclusively shows that Goodrich was required to incinerate waste PERCHLORATE and solvents contaminated with explosive propellants in a burn pit. And to the extent releases of PERCHLORATE and solvents occurred at Rialto, they resulted from Goodrich's compliance with these requirements that were imposed upon it by the federal government. Goodrich therefore cannot be held liable now under the conflicting state laws upon which the Advocacy Team relies, as both the Supremacy Clause of the United States Constitution and the modern-day government contractor defense shield Goodrich from liability in these proceedings.

First, because military disposal regulations were issued under federal statutes, they carry the force of law. In the event of a direct conflict between state law and federal regulations, the Supremacy Clause of the United States Constitution directs that state law must recede. Courts have long recognized that federal military manuals and regulations promulgated under federal law must trump conflicting state laws. Second,